INDEX

CITATIONS

578032—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 514–515

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES P. MITCHELL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 55–57) has not yet been reported.

JURISDICTION

The judgments of the court of appeals reversing respondent's convictions of housebreaking and larceny and remanding the cases to the district court for new trials were entered on October 25, 1943 (R. 58, 59). The petition for writs of certiorari was filed November 29, 1943, and granted January 17, 1944 (R. 48). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Section 1 of the Act of August 18, 1894, c. 301, 28 Stat. 416, as amended (18 U. S. C. 595), provides:

> It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof.

D. C. Code, Title 4, sec. 140:[1]

> The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take

[1] This section, though cited by the Court of Appeals, is in our view inapplicable, for the reasons stated *infra*, p. 13, n. 18.

into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law. (R. S., D. C., § 397.)

QUESTIONS PRESENTED

1. Whether the rule of *McNabb* v. *United States*, 318 U. S. 332, requires a holding that a confession made during detention and prior to hearing before a committing magistrate is inadmissible in evidence even though at the time of confession the detention was not illegal, the confession was not given in response to interrogation, and the subsequent delay in going before a committing officer bore no causative relation to the making of the confession.

2. Whether the rule of *McNabb* v. *United States* prevents the use in evidence of property discovered by police officers in a search made without a search warrant but with the defendant's consent given while in detention prior to being taken before a committing magistrate.

STATEMENT

In each of two indictments, filed in the United States District Court for the District of Colum-

bia, respondent was charged in separate counts with housebreaking and larceny (R. 1–2, 26–27). He was separately tried under each indictment, and in each case he was found guilty by a jury on both counts (R. 9, 33). In one case he was committed to the custody of the Attorney General for imprisonment of from one to three years (R. 11–12); and in the other case he was given a similar sentence of from one and a half to four and a half years, to run concurrently with the first sentence (R. 35). On appeal to the Court of Appeals for the District of Columbia, the judgments of conviction were reversed in a *per curiam* opinion (R. 44–45) relying exclusively upon this Court's decision in *McNabb* v. *United States,* 318 U. S. 332. The circumstances of respondent's arrest and conviction, in which the court below found a violation of the *McNabb* rule, may be thus summarized:

On the night of August 11–12, 1942, the home of Harry G. Meem in Washington had been broken into and various items of personal property, including a pair of cuff links, had been stolen therefrom (R. 17).[2] On October 12, 1942, Charles T. Williams, a police officer, found at A. Kahn, Inc., jewelers, a pair of cuff links answering the description of those stolen, which had been purchased by Kahn's on August 13, 1942,

[2] The housebreaking and theft at the Meem home were the charges of the two counts in the first indictment (R. 1–2).

from a person giving the name and address of James Mitchell, 1427 *W* Street NW. (R. 17–18). This clue led Williams at 2:00 p. m. on October 12th to respondent's home at 1427 *N* Street NW., where he met and talked with respondent. (R. 18, 39, 41.) Williams then went to Meem's home where the latter identified the cuff links (R. 18). Accompanied by another police officer, Williams returned to respondent's home at about 7:00 p. m. the same day and asked him to go with him them to the precinct station for questioning. Both officers testified that they did not arrest respondent; that he accompanied them without remonstrance; that they did not question him during the ride to the station in their automobile; that they did not then or at any time thereafter use force or make threats or hold out hope of reward or favor, or mistreat respondent in any way; and that upon arrival at the station they told him "that they knew what he had done and told him that he did not have to say anything, but that all they wanted to know was who had worked with him," whereupon he "freely admitted that he had broken into the home of Mr. and Mrs. Meem and admitted that he had taken the cuff links in question as well as the other property which was identified". (R. 15, 18, 19, 39–41.) At the same time he admitted having broken into and stolen various items of personal property from the home of Anthony Lucas

(R. 40).[3] The entire confession was given at approximately 7:00 p. m., within a few minutes after arrival at the police station (R. 15, 18, 19, 39–41). Respondent at the same time "told the officers that the goods which he stole were located in various parts of his home on N Street NW., and gave the officers express permission to go to his home and obtain all the property that was there" (R. 15, 18, 19, 40), telling them that "some of it was located in two trunks in the basement" (R. 40). Without a search warrant, but pursuant to respondent's expressed consent, the officers then went to his home and secured the stolen property (R. 15, 40) which was introduced in evidence at the trials and there identified (R. 17, 19, 39, 40).

Respondent was not taken before a committing magistrate the next morning, but was held at the police station under no charge other than for investigation until October 19th, and was arraigned before a committing magistrate on October 20th—a lapse of eight days (R. 15, 19, 41). The reason for the delay in arraignment was that the officers had recovered from respondent's home property that had been stolen in more than thirty Washington housebreakings and respondent was cooperating with the police and the victims in iden-

[3] The housebreaking and theft at the Lucas home were the charges of the two counts in the second indictment (R. 26–27).

tifying this property (R. 41; see also R. 15).[4] From the beginning respondent "was very cooperative and told the police that he wanted to help them in investigating the various housebreakings in which he was involved, and * * * asked to be kept at the precinct station until the cases were cleared up" (R. 15). While in detention he "was not mistreated in any way, but on the contrary was shown every possible courtesy and was on occasions visited by his mother and others" (R. 15–16).

Shortly before the first case was called for trial, respondent moved to suppress evidence in all the cases pending against him (R. 3–4, 14–15).[5] After a hearing at which respondent and Officer Williams testified (R. 15), the motion was denied by Justice McGuire (R. 4–5, 16). A similar motion made in the second case was denied by Justice Laws on the basis of Justice McGuire's prior ruling (R. 31, 39). At each trial the evidence of guilt consisted principally of the testimony of the officers to respondent's oral confessions made on the early evening of October 12, 1942 (*supra*, p. 5), and of the property stolen from the Meem and Lucas homes, secured that evening from respondent's home with his consent (*supra*, p. 6),

[4] Only the property stolen from the Meem and Lucas homes was, of course, introduced in evidence at the trials below.

[5] The housebreakings to which respondent confessed had resulted in a large number of indictments, only two of which are involved here.

which was identified at the trials by the owners thereof (R. 17, 39). Motions were made to exclude the testimony as to the oral confessions, on the authority of the *McNabb* case (R. 18–19, 41). Before admitting the testimony in the first case Justice McGuire heard evidence and argument at length out of the presence of the jury, and at the conclusion thereof he remarked, and respondent's counsel agreed, "that the issue drawn in the testimony on the motion was one of fact whether the defendant had, at any time, made any admissions to the officers which they affirmed and he denied" (R. 18–19). The motion was denied (R. 19).* The similar motion in the second case was likewise denied by Justice Laws, after a conference with counsel at the bench (R. 41). Respondent took the witness stand at the trials and denied having made the confessions or given consent to the search of his home and removal of the stolen property therefrom. He testified that he was

* In view of the consensus as to the issue before the judge on the motion, the denial of the motion must be taken as a finding by the trial court that the confessions had been made. Assuming that they were made, there was no issue as to when they were made; for the testimony on behalf of the Government was uniform as to the circumstances under which they were made, and the defendant did not claim that they were made at any other time but, rather, that none had been made at all. The denial of the motion amounts, therefore, to a finding that the confessions were made shortly after 7 o'clock on the evening of October 12th. The court of appeals so assumed in stating the facts for the purpose of considering the application of the *McNabb* case (R. 44).

beaten by the officers both in the automobile while en route to the station and thereafter at the station.[7] (R. 19–20, 42.) This evidence was controverted by the Government (R. 18, 20, 40–41, 42–43). Motions for directed verdicts were denied and respondent was convicted in both cases (R. 20–21, 43).

The court of appeals, reciting as a fact that "after appellant was arrested and brought from his home to the Police Station and interrogated by the officers, the confession obtained and his consent to the search given, he was continued under arrest for more than a week by the police without being brought before a magistrate, commissioner, or court" (R. 44), reversed the con-

[7] Respondent testified "that he was beaten continuously from the time he arrived at the precinct station for about fifteen or eighteen hours when he went into what he described as a coma, being unconscious from that time on for a considerable period" (R. 20). However, he admitted on cross-examination "that about midnight of the night of his arrest the police officers took him back to his home where they permitted him to feed his dog" (R. 42), and "that the next evening, that is, October 13, 1942, he was taken to Police Headquarters where he was photographed by a police photographer at which time he said nothing to the photographer or anyone else about his physical condition" (R. 20). The photograph was admitted in evidence in refutation of respondent's testimony, over his objection (R. 20). In view of the finding by the trial court and the verdict of the jury, we have, as was done in the *McNabb* case, "treated as facts only the testimony offered on behalf of the Government and so much of the [respondent's] evidence as is neither contradicted by nor inconsistent with that of the Government." *McNabb* v. *United States*, 318 U. S. 332, 338–339, footnote 5.

victions on the authority of *McNabb* v. *United States*, 318 U. S. 332. It stated (R. 44) that it "was almost this identical situation which, the Supreme Court in *McNabb* v. *U. S.* said, makes a confession, voluntary or involuntary, inadmissible in evidence on the trial of the case." Although the opinion of the court of appeals is not explicit on the point, the failure to arraign promptly was apparently also regarded as vitiating respondent's consent to the search of his premises and seizure of the stolen property, thereby rendering the latter inadmissible in evidence at the trials.

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that the facts of the instant case fall within the rule of *McNabb* v. *United States*, 318 U. S. 332;

2. In holding that the *McNabb* rule precludes the use of evidence procured by a search made pursuant to a defendant's consent given while in detention prior to arraignment;

3. In reversing the judgments of conviction and remanding the cases to the district court for new trials.

SUMMARY OF ARGUMENT

1. As the confession in the present case was given shortly after respondent was apprehended, it was not the product of the unlawful detention which followed. In our view, *McNabb* v. *United*

States, 318 U. S. 332, does not warrant the exclusion of such a confession at the respondent's trial. This view is supported by the reasoning in the *McNabb* case itself. That case is based on a principle similar to that which calls for the exclusion from evidence of property taken in an unlawful search and seizure. In such cases the fact that a lawful search is followed by unlawful conduct on the part of the officers does not render inadmissible property taken prior to the unlawful conduct. *McGuire* v. *United States,* 273 U. S. 95. Likewise, where evidence is secured subsequent to unlawful conduct, as for example, illegal wire tapping, the test of admissibility of the evidence is whether there was a "causal connection" between its procurement and the information which had previously been illegally obtained. *Nardone* v. *United States,* 308 U. S. 338, 341.

To broaden the rule of exclusion to cover evidence which was not the fruit of unlawful conduct would be to perform a legislative function in devising penalties for infractions of statutory duties. The test of causal relationship, on the other hand, is one entirely appropriate to the courts' function in passing on the admissibility of evidence which, but for the proscribed conduct, would presumably not have been available. Extension of the rule of exclusion would transfer the doctrine of trespass *ab initio* from the field of civil liability, where at best it is of dubious

authority, to a field where the civil liability of the trespasser is not directly in issue.

The mere fact that a confession is given while the person is in custody does not render it inadmissible, as the *McNabb* decision recognizes. If further restrictions on the questioning of persons in custody are to be established, it would doubtless be necessary to provide some administrative machinery for the taking of statements; this is a problem with which legislative action, in the broad sense, can most appropriately deal.

Our view of the scope of the *McNabb* decision is the same as that taken by the Advisory Committee appointed by this Court to assist in the preparation of federal rules of criminal procedure.

2. The stolen property was admissible in evidence. The consent to the search of respondent's premises was, as the courts below found, voluntarily given shortly after he was taken into custody. The *McNabb* decision did not deal with the effect of consent to a search. If that decision has application to that field, its scope there is at least as limited as with respect to confessions. The reasons which justify the admission of the confession are equally pertinent as to seized property. It is therefore unnecessary to consider to what extent the standards governing a search for stolen property may differ from those governing a search merely to secure incriminating evidence. *United States* v. *Lefkowitz,* 285 U. S. 452, 465–466.

ARGUMENT

I

THE CONFESSION WAS ADMISSIBLE IN EVIDENCE

In *McNabb* v. *United States*, 318 U. S. 332, this Court held inadmissible confessions which were the product of unlawful detention of the accused. It is our understanding that neither the decision itself nor the reasoning on which it rests goes further and would require exclusion of a confession which was not so produced. If our understanding is right, the decision below cannot stand.

In the present case the confessions held inadmissible on the authority of the *McNabb* decision were not given during a period of unlawful detention. There had been no unnecessary delay in arraignment at the time the confessions were given.[8] They were given almost immediately

[8] In its opinion (R. 44) the court commented that the delay in arraignment was "in the very teeth of the statute which commands arraignment 'immediately and without delay'," citing D. C. Code (1940), Title 4, Sec. 140. This section is clearly inapplicable, since it applies only to arrests for offenses (including misdemeanors and breaches of the peace) committed "in the presence of such member [of the police force], or within his view." The officers, in arresting respondent here, were not acting under this section, but presumably under the general police power to arrest an individual without a warrant on reasonable ground to believe that that individual has committed a felony. See *Maghan* v. *Jerome*, 88 F. (2d) 1001, 1002 (App. D. C.), holding that the above-cited section of the District of Columbia Code does not define the power to arrest for felonies; that power per-

after respondent's arrest.[9] An arraignment early on the following morning of October 13th would have constituted, we believe, a sufficiently prompt arraignment, though it is not necessary to decide that question here.[10] Admittedly the subsequent detention of respondent for a period of seven days without arraignment was unlawful. But it was not during that period that the confessions were given. The subsequent delay in arraignment could not possibly have had a causative relation to the confessions; and therefore all basis for a presumption of such a relationship as applied to the facts of the *McNabb* case, where the confessions were given in response to interrogation during the period of unlawful detention, is lacking here.

---

sists as at common law. See also, to the same effect, *Shettel* v. *United States*, 113 F. (2d) 34, 35 (App. D. C.). Housebreaking is a felony in the District of Columbia. D. C. Code, Title 22, Sec. 1801. The applicable statute requiring prompt arraignment is 18 U. S. C. 595 (one of the statutes relied upon by this Court in its decision in the *McNabb* case), which contains no specific language regarding the time of arraignment.

[9] Although for the purposes of this petition we assume, as did the court below (R. 44), that respondent was arrested, there is even doubt whether this was technically the case. The police officers testified that respondent, when he accompanied them, "was not under arrest" (R. 15).

[10] We do not believe that under either 18 U. S. C. 595 or the provision of the D. C. Code cited by the court below the duty of an arresting officer requires that he attempt to reach a committing magistrate at his home, or outside of office hours. See *Bullock* v. *United States*, 122 F. (2d) 213, 215 (App. D. C.), certiorari denied, sub nom. *Bullock* v. *Hines*, [illegible]: "Appellant's detention for more than 36 hours

That the *McNabb* case requires the exclusion only of confessions which are the product of an unlawful period of detention was the position taken by the Government in *Stephan* v. *United States,* No. 792, 1942 Term, in which this Court denied certiorari (318 U. S. 781; 319 U. S. 423, 424). In opposing the petition for certiorari in that case, the Government invited the Court's attention to the fact that the petitioner's confession, which had been admitted in evidence against him, was signed at 1:30 in the morning of April

---

without hearing or commitment, which would ordinarily have been unlawful, was perhaps excused by the fact that it occurred on Saturday night and Sunday"; *United States* v. *Ebbs*, 10 Fed. 369, 375 (W. D. N. C.): "Nothing, however, but obvious necessity will authorize an officer to lodge a prisoner in jail before an examination and regular written commitment by a magistrate. This course may be adopted if the arrest is made in or near night, whereby he cannot attend the magistrate"; *Janus* v. *United States*, 38 F. (2d) 431 (C. C. A. 9), holding on particular facts that detention without a warrant "until office hours" of the magistrate on the day following the arrest was proper. None of these cases was decided under a statutory command for arraignment "immediately, and without delay"; but such an absolute command, even had it been applicable, must presumably be construed reasonably.

The proposed Federal Rules of Criminal Procedure use the standard "without unreasonable delay." Preliminary Draft and Second Preliminary Draft, Rule 5 (a). The Uniform Arrest Act (Sec. 11) provides: "If not otherwise released, every person arrested shall be brought before a magistrate without unreasonable delay, and in any event he shall, if possible, be so brought within twenty-four hours of arrest, Sundays and holidays excluded, * * *." See Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 347 (1942).

578032—44——2

20, 1942, one and one-half hours after Government agents asked him to accompany them to their office. Of this confession the Government said, in language that is equally applicable to the oral admissions of the respondent in the present case (Br. in Opp. No. 792, 1942 Term, pp. 26–27, n. 13):

> So far as acknowledgment of facts could ever occur simultaneously with apprehension, it happened here, and in view of the spontaneity of petitioner's admission, we do not believe that any of the problems presented by *McNabb* v. *United States* are involved here.

In several cases district courts have directed acquittals under the *McNabb* decision where the defendants have freely and promptly admitted their guilt on apprehension, but where the defendants could not be immediately arraigned. In these cases, though in the judgment of the Government the decisions were erroneous, no appeal was available.[11]

[11] The cases, unreported, are described in our petition for certiorari in the present case, pp. 16–17, n. 14. Compare the following decisions in which the *McNabb* case was applied: *Haupt* v. *United States*, 136 F. (2d) 661 (C. C. A. 7), conviction of six defendants for treason reversed and new trial ordered; *Runnels* v. *United States*, 138 F. (2d) 346 (C. C. A. 9), conviction for murder, reversed; *Gros* v. *United States*, 136 F. (2d) 878 (C. C. A. 9), conviction for violation of the Foreign Agents Registration Act and for conspiracy unlawfully to disclose to the German Reich information affecting the national defense, reversed.

Our view of the *McNabb* case, which, as has been stated, was advanced in the *Stephan* case in this Court, is supported by the language of the opinion, by the reasoning which underlies it, and by the view which thoughtful commentators have taken with respect to it.

In the *McNabb* case the testimony of the arresting officers showed clearly that the illegal detention continued throughout the process of the interrogation of the defendants. Three of the defendants were taken into custody between one and two o'clock on a Thursday morning, and were held incommunicado in a barren cell for fourteen hours before the questioning ever began. Another was handed over by the local police to the Federal authorities about nine or ten o'clock on Thursday morning, and still another voluntarily surrendered about eight or nine o'clock Friday morning. All were questioned, both separately and together, for long and short periods, at various times of the day and night, always before at least six officers. The questioning continued until around two o'clock Saturday morning.[12] In stating its conclusion the Court said: "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted *upon*

[12] The record did not disclose when the defendants were arraigned.

evidence secured under the circumstances revealed here" (318 U. S. at 347; italics supplied). The opinion is replete with language emphasizing the likelihood of a causative relation between the interrogation during unlawful detention and the confession.[13] The decision rests, we believe, upon a causative relation of the confessions to the illegal detention and to interrogation by Government officers during such detention. We believe that it goes no further.

The basis for the *McNabb* ruling is lacking here. That decision proceeded upon grounds which have led the courts to exclude evidence obtained in violation of the constitutional guarantee against unlawful searches and seizures. It is settled that, although the constitutional guarantee does not extend in terms to the exclusion of evidence, the courts will provide an effective sanction when they are asked to admit evidence secured in violation of Amendment IV of the

[13] See, for examples, the following quotations, in addition to that in the text:

"The circumstances in which the statement admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers" (p. 344).

"Bejamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours" (p. 345).

See also the statement relied upon by the court of appeals in its opinion (R. 45).

It is clear, we believe, that all of these statements lay emphasis, implicitly if not expressly, upon the causative relation of the illegality to the confessions.

Constitution. See, *e. g.*, *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Gouled* v. *United States*, 255 U. S. 298; *Agnello* v. *United States*, 269 U. S. 20; *Grau* v. *United States*, 287 U. S. 124 (all cited in the *McNabb* case, 318 U. S. at 339–340). While no constitutional issue is presented here, the analogy to the foregoing cases is plain. It therefore becomes particularly relevant to enquire into the result which obtains under the searches and seizures clause in a situation comparable to that here presented. Such a situation was dealt with in *McGuire* v. *United States*, 273 U. S. 95. There revenue agents, acting under a search warrant, discovered several gallons of intoxicating liquor which they seized and which, except for two quarts, they destroyed "without court order or other legal authority." The liquor retained was received in evidence over objection. This Court, while recognizing that the destruction of the liquor was "an illegal and oppressive act," nevertheless upheld the admissibility of that portion of the liquor as to which there had been no excess of authority. The Court said (pp. 99–100): "The seizure of the liquor received in evidence was in fact distinct from the destruction of the rest. Its validity so far as the government is concerned should be equally distinct." Later, in *United States* v. *Lee*, 274 U. S. 559, 563, the Court said, citing the *McGuire* case, "A later trespass by the officers, if any, did not render inadmissible

in evidence knowledge legally obtained." Thus it has been held that a search which exceeds in scope that authorized by the warrant does not require the exclusion of evidence secured in the lawful portion of the search. *Rising Sun Brewing Co.* v. *United States,* 55 F. (2d) 827, 828 (C. C. A. 3); *United States* v. *Tot,* 131 F. (2d) 261, 264 (C. C. A. 3), certiorari denied on this question, 317 U. S. 623, reversed on other grounds, 319 U. S. 463.

A cognate problem is presented where it is sought to exclude evidence secured after, instead of before, unlawful conduct on the part of officers. The unlawful conduct may consist in illegal wire-tapping, for example, or an illegal search and seizure. In such cases the test of admissibility of the subsequently procured evidence is whether there was a "causal connection" between its procurement and the information which had been illegally obtained. *Nardone* v. *United States,* 308 U. S. 338; see also *Silverthorne* v. *United States,* 251 U. S. 385, 392.

A broadening of the rule of exclusion would rest upon one of two grounds, each of which, it is submitted, is unsound. In the first place, it might be suggested that a broader rule of exclusion would be a more effective sanction for the statutory direction of prompt hearing. But this argument proves too much. The problem for the courts is not to devise the most effective sanction for the statute. A still more effective sanction

would be the conferring of total immunity from prosecution upon one who was the victim of unlawful conduct on the part of arresting officers; but of course no such result has been contemplated. The function of the court and jury in trying a criminal case is primarily to arrive at the truth of the criminal charges. That function does not, indeed, relieve a court of the responsibility of keeping out of the case matters which, but for official conduct prohibited by law, would not be available. To exclude more would be at once to usurp the function of the legislature in devising penalties for infractions of statutory duties, and to obscure the function of the court in trying the truth of the charges against the accused. From another point of view, it would be to transfer the rule of trespass *ab initio*, dubious enough in the field of civil liability,[14] to a collateral field

[14] See Bohlen and Shulman, *Effect of Subsequent Misconduct Upon a Lawful Arrest*, 28 Col. L. Rev. 841, 858: "The whole doctrine of trespass *ab initio* is discredited even in the field in which it had its origin. * * * It may be doubted whether a prisoner, whose detention has been prolonged by an unnecessary delay in bringing him before a court for hearing, is not sufficiently compensated by permitting him to recover for so much of his subsequent detention as is unnecessarily caused by the officer's delay"; *Restatement of the Law of Torts*, sec. 136: "If the actor, having obtained the custody of another by a privileged arrest, * * * (c) fails to use due diligence to take the other promptly before a proper court, or to give the other promptly into the custody of a third person authorized to take the custody of him, * * * the actor's misconduct makes him liable to the other only for such harm as is caused thereby and does not

where the liability of the trespasser is not directly in issue. That the rule should not be so transferred was expressly decided in the *McGuire* case, *supra*.

In the second place, it might be suggested that no incriminating statements may be received in evidence if they were given while the accused was under detention, whether lawful or not. Such a rule would, of course, overturn the long-established doctrine which was recognized and repeated in the *McNabb* case itself (p. 346): "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." Moreover, changes in the conditions under which questioning may lawfully be carried on or statements lawfully received prior to trial are peculiarly matters for the constructive action of legislation or general rule-making. If a policy of affording additional protection in this regard for persons in custody were to be devised, it would doubtless be thought necessary to establish some form of machinery for the taking of statements from the persons held.[18] Congress has not expressed such a policy or established such machinery. The interest of courts in receiving relevant evidence is, therefore, not to be impaired by a

---

make the actor liable for the arrest or for keeping the other in custody prior to the misconduct." See also Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469.

[18] Compare the Scottish and the English procedure described in the Note to Rule 5 (b), Proposed Federal Rules of Criminal Procedure, [First] Preliminary Draft, pp. 14–15.

decisional rule of exclusion based merely on the fact that the confessor was in custody. As this Court said in *Nardone* v. *United States*, 308 U. S. 338, 340: "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land."

Our view that the *McNabb* case is applicable only to confessions secured as the result of unlawful detention is the view taken also by the Advisory Committee appointed by this Court to assist in the preparation of federal rules of criminal procedure. Rule 5 (b) in the Preliminary Draft of Federal Rules of Criminal Procedure (May 1943) provided as follows:[16]

> No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule [Rule 5 (a)].[17]

The proposed rule as thus drafted was regarded by the Committee as resting upon considerations

[16] We are informed that the Committee has now deleted Rule 5 (b) from the proposed rules, owing, among other things, to objections to an attempt to crystallize a rule of evidence in such a codification. Cf. Second Preliminary Draft (Feb. 1944).

[17] Rule 5 (a) required the arresting officer "without unnecessary delay" to take the arrested person before the nearest available committing officer.

which were "in substance those set forth in the opinion of the court in *McNabb* v. *United States*, although the proposed rule was adopted before the decision of that case" (Preliminary Draft, p. 13). In explanation of the scope of the proposed rule, the Committee stated (Preliminary Draft, pp. 13–14):

> It is to be noted that the proposed rule does not exclude voluntary statements made in response to interrogation by officers unless at the time the statement is made the detention is unlawful under Subdivision (a); interrogation during the permissible period of detention is not prohibited. Even if the detention is unlawful, moreover, voluntary statements made otherwise than in answer to interrogation by government agents are not rendered inadmissible.

Trustworthy evidence is frequently given promptly after a person is taken into custody, whether through a desire to cooperate with the law-enforcement officers or through a desire to make a statement which is in part exculpatory and only in part incriminating. Where such evidence is not the fruit of official misconduct, it should not be withheld, we submit, from the triers of fact. Disciplinary measures with respect to subsequent misconduct should not take the form of a rule of evidence excluding statements which are themselves not the product of such misconduct.

II

THE STOLEN PROPERTY WAS ADMISSIBLE IN EVIDENCE

Respondent moved before each trial to suppress as "evidence" the stolen property recovered by the police at his rooming house (R. 3–4, 31–33). In accordance with the established procedure (see *Gouled* v. *United States*, 255 U. S. 298, 312), the court at the first trial held a hearing preliminary to the trial on the issue of the legality of the search (R. 14–16). Respondent denied that he had authorized the police to enter his premises (R. 15). The officers testified that respondent not only invited them to enter the boarding house but described to them the places where they would find the stolen property and then, after they had recovered it, respondent assisted them in identifying the homes of the victims of respondent's many larcenies (R. 15–16). The issue before the trial judge was whether respondent had authorized the police to enter his premises. That issue was resolved by the trial court in the Government's favor. It will be noted that, while respondent testified with respect to the consent to search his premises as with respect to his oral confession, that coercive measures were employed, he insisted that no consent was in fact given. Hence, to have found that consent was given under duress would have required the court to disbelieve half of respondent's testimony. It is evident that the court disbelieved the testimony as

a whole and accepted that of the Government's witnesses. The court of appeals found no occasion to disturb the finding but reversed solely on the supposed compulsion of the *McNabb* case.

In the *McNabb* case no issue was presented with respect to the effect of an unlawful detention upon consent given to the search of premises. Whether the principle of that decision applies in this field is therefore undetermined. If it be assumed that the principle does apply, the considerations advanced in the foregoing portion of our argument, in relation to the oral confession, are equally pertinent here, since the consent, like the oral confession, was given shortly after reaching the station and not during the period in which detention became illegal.

It may be added that, the *McNabb* decision aside, there is no principle which would exclude evidence obtained through a search of the defendant's premises made with his deliberate consent. A search is not unreasonable if the owner of the premises consents that it be made. This is but another way of saying that the immunity given by the Fourth Amendment may be waived (cf. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269). If consent to a search is understandingly and deliberately given, proof obtained in the search is admissible on the owner's trial. *Cantrell* v. *United States*, 15 F. (2d) 953 (C. C. A.

5), certiorari denied, 273 U. S. 768; *DeLapp* v. *United States*, 53 F. (2d) 627 (C. C. A. 8), certiorari denied, 284 U. S. 684; *Marsh* v. *United States*, 29 F. (2d) 172 (C. C. A. 2); *United States* v. *Jankowski*, 28 F. (2d) 800 (C. C. A. 2); *Poetter* v. *United States*, 31 F. (2d) 438 (C. C. A. 9); *United States* v. *Bianco*, 96 F. (2d) 97 (C. C. A. 2); *Windsor* v. *United States*, 286 Fed. 51 (C. C. A. 6); *Stobble* v. *United States*, 91 F. (2d) 69 (C. C. A. 7); *Gatterdam* v. *United States*, 5 F. (2d) 673 (C. C. A. 6); *Giacolone* v. *United States*, 13 F. (2d) 110 (C. C. A. 9); *Waxman* v. *United States*, 12 F. (2d) 775 (C. C. A. 9).

The present case does not involve a mere failure to protest against the intrusion of officers into the defendant's home. Cf. *Nueslein* v. *United States*, 115 F. (2d) 690 (App. D. C.). Nor, in view of the evidence and the findings below, does it involve consent given as the result of fear, cf. *Amos* v. *United States*, 255 U. S. 313, or consent given by an agent. *Ibid.* The fact that the consent was given to arresting officers does not render it involuntary. *DeLapp* v. *United States, supra; Cantrell* v. *United States, supra.* Thus the sole question with respect to the evidence obtained through the search, as the court below recognized, is that of the applicability of the *McNabb* decision to the circumstances of the

present case,[18] On that question, for the reasons heretofore given, we believe that the decision below is erroneous.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments of the court of appeals should be reversed and those of the district court affirmed.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
PAUL A. FREUND,
Special Assistants to the Attorney General.
JESSE CLIMENKO,
Attorney.

MARCH 1944.

[18] It is unnecessary, in view of the fact of consent, to consider whether a search for stolen property is governed by standards different from those relating to a general search for incriminating evidence. In *United States* v. *Lefkowitz*, 285 U. S. 452, 465–466, this Court said: "The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia, and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States*, 116 U. S. 616, *et seq.* *Weeks* v. *United States*, 232 U. S. 383, 395. *Gouled* v. *United States*, *supra*, 306. *Carroll* v. *United States*, *supra*." Compare D. C. Code, Title 4, Section 141.

U. S. GOVERNMENT PRINTING OFFICE: 1944